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No. 01-1444

In The
SUPREME COURT OF THE UNITED STATES

BEN CHAVEZ, Petitioner

v.

OLIVERIO MARTINEZ, Respondent

On Writ of Certiorari to the
United States Court of Appeals
For the Ninth Circuit

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF POLICE ORGANIZATIONS, IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

The National Association of Police Organizations is a non-profit organization, representing state and local law enforcement officers throughout the United States. NAPO is a coalition of associations and unions that serves to advance the interests of law enforcement officers through advocacy, education and legislation. NAPO represents 4,000 organizations, with more than 220,000 sworn law enforcement officers and 11,000 retired officers. Within the Ninth Circuit, NAPO represents through its members tens of thousands of officers in Alaska, Arizona, California, Montana, Nevada, Oregon and Washington, including petitioner.

The specter of undue civil liability can have adverse effects on investigative initiative, and on the ability of agencies to recruit and retain sufficient experienced officers to provide the levels of public safety society demands and deserves.

Therefore, the associations and officers represented by NAPO and its 501(c) affiliate, the National Law Enforcement Officers' Rights Center, have a direct and immediate interest in the resolution of any issue that simultaneously affects both the ability of law enforcement officers to investigate crimes, and their potential civil liability for doing so in particular ways. This case presents such an issue.*

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* No counsel for a party authored this brief in whole or in part, and no person other than the *amicus curiae*, its members or their counsel made a monetary contribution to the preparation or submission of this brief. Petitioner and respondent have consented to the filing of this brief, and their respective letters of consent have been filed with the Clerk of the Court.

SUMMARY OF ARGUMENT

The Ninth Circuit analysis of § 1983 claims for coercive police interrogation errs in interchanging Fifth and Fourteenth Amendment principles, and in assuming that practices which may make statements inadmissible in a criminal trial *ipso facto* violate the Constitution, so as to make interrogating officers civilly liable.

ARGUMENT

I. The Court of Appeals erred in analyzing respondent's § 1983 coercive interrogation claim under the Compulsory Self-incrimination Clause of the Fifth Amendment, rather than under the Fourteenth Amendment Due Process Clause.

In any action under § 1983, the first step is to identify the exact contours of the underlying right said to have been violated. *Graham v. Connor*, 490 U.S. 386, 394 (1989). In taking this first step, the Court of Appeals stumbled.

This Court said, in *Dickerson v. United States*, 530 U.S. 428, 442 (2000), that a person claiming to have been subjected to coercive police interrogation "may bring a federal cause of action under the Due Process Clause," citing *Wilkins v. May*, 872 F.2d 190, 194 (7th Cir. 1989). The *Wilkins* court rejected the argument that coercive interrogation claims should be analyzed under the Fifth Amendment provision against compulsory self-incrimination, holding instead that they should be analyzed under the Due Process Clause of either the Fifth Amendment (for *Bivens* claims against federal officers) or Fourteenth Amendment (for § 1983 claims against state officers, as here). *Id.*, at 195.

Wilkins noted that the test for liability under the Due Process Clause involves "a high threshold," requiring a plaintiff to "show misconduct that a reasonable person would find so beyond the norm of proper police procedure as to shock the conscience." *Ibid.* This is the same standard that

this Court has repeatedly reaffirmed as the proper test for civil liability under the Due Process Clause. *E.g., County of Sacramento v. Lewis*, 523 U.S. 833, 846-49 (1998); *Whitley v. Albers*, 475 U.S. 312, 327 (1986). At the outset of its discussion, therefore, the Ninth Circuit Court of Appeals should have noted that Martinez was seeking recovery for allegedly coercive interrogation by Sgt. Chavez under **both** the Fifth and Fourteenth Amendments. This redundant statement of claims should have been rejected, and the Court of Appeals should have confined its analysis to the issue of whether the undisputed material facts stated a claim for conscience-shocking behavior in violation of Fourteenth Amendment substantive due process. This approach would have been consistent with this Court's suggestion in *Dickerson*, and with the holdings of *Lewis* and *Albers, etc.*

This approach also would have kept the Court of Appeals from erroneously straying into *Miranda* issues, which relate exclusively to the admissibility of a criminal defendant's extrajudicial statements at his criminal trial. *Beckwith v. United States*, 425 U.S. 341, 345 (1976) (the "narrow issue" decided by *Miranda* was "admissibility of statements"); *Dickerson v. United States, supra*, 530 U.S. at 432 (*Miranda* and its progeny "govern the admissibility of statements" in state and federal courts). Questionable conclusions about "custody" and "interrogation" need not have been reached. (The recited facts do not establish, for example, that Martinez was under arrest or corresponding police restraint at the hospital, or that Sgt. Chavez's questioning when Martinez was expected to die could have been for the purpose of eliciting statements with which to incriminate Martinez at a criminal trial.)

And a due process approach would have prevented the Ninth Circuit from continuing its solitary departure from the overwhelming consensus of the remaining circuits on this issue. The opinion below completes a trilogy of opinions in which the Ninth Circuit has held that interrogation conducted

without compliance with *Miranda*'s admissibility prerequisites of warning and waiver may be actionable under § 1983 as violative of the Fifth Amendment privilege that *Miranda* was designed to protect. *See also, Cooper v. Dupnik*, 963 F.2d 1220 (9th Cir. 1992) and *California Attorneys for Criminal Justice v. Butts*, 195 F.3d 1039 (9th Cir. 2000).

In contrast with the Ninth Circuit, the consensus of the other federal circuits is that police deviation from *Miranda* procedures does not state a claim under the Fifth Amendment *per se*, and that actual constitutional violations of the privilege against compelled self-incrimination occur only with the wrongful introduction of a defendant's statement *at his trial*. *Mahan v. Plymouth County House of Corrections*, 64 F.3d 14, 17 (1st Cir. 1995); *Neighbor v. Covert*, 68 F.3d 1508, 1510 (2nd Cir. 1995); *Giuffre v. Bissell*, 31 F.3d 1241, 1256 (3rd Cir. 1994); *Riley v. Dorton*, 115 F.3d 1159, 1165 (4th Cir. 1997); *Hutsell v. Sayre*, 5 F.3d 996, 1005, n.13 (6th Cir. 1993); *Hensley v. Carey*, 818 F.2d 646, 650 (7th Cir. 1987); *Davis v. City of Charleston, Missouri*, 827 F.2d 317, 322 (8th Cir. 1987); and *Bennett v. Passic*, 545 F.2d 1260, 1263 (10th Cir. 1976).

This Court, too, has made clear that while the Fifth Amendment privilege is available to be *claimed* in a variety of settings—including custodial police interrogation—an actual constitutional violation occurs only when a compelled statement is admitted to prove guilt at trial. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 264 (1990); *United States v. Balsys*, 524 U.S. 666, 692 (1998) (rejecting the notion that the Fifth Amendment provides a "protection of personal inviolability" that prohibits involuntary interrogation, without regard to whether testimonial responses could or would be used in a criminal prosecution).

In this case, however, the Court of Appeals described this Court's statement in *Verdugo-Urquidez* as unpersuasive "dicta," and failed to acknowledge *Balsys* and other cases in

which this Court has repeatedly taught that the Fifth Amendment is not violated by the *compulsion* of statements, but by their *use* in a criminal prosecution. *Lefkowitz v. Turley*, 414 U.S. 70, 78, 84 (1973); *Kastigar v. United States*, 406 U.S. 441, 453 (1972); *Garner v. Broderick*, 392 U.S. 273, 276 (1968).

Unlike violations of the Fifth Amendment protection against compelling an accused to be a witness against himself—which are trial errors—violations of the due process clauses may occur either pretrial or during trial. *Substantive* due process protects suspects against interrogation techniques that shock the conscience. Such interrogation *is* actionable under § 1983, because the constitutional violation "is complete when the wrongful action is taken." *Zinermon v. Burch*, 494 U.S. 113, 125 (1990).

On the other hand, *procedural* due process protects against the use of coerced confessions at trial, even though the degree of coercion may not have been sufficient to shock the conscience, but still enough to render the resulting confession involuntary.

Wrongful introduction of such an involuntary confession, however, cannot form the basis for § 1983 liability against officers, for this procedural mistake is a "trial error, similar ... to the erroneous admission of other types of evidence." *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991). Police officers, of course, cannot be held liable for mistakes made by trial judges in the admission of evidence. *Duncan v. Nelson*, 466 F.2d 939, 942 (7th Cir. 1972) (police not liable where judge admits involuntary confession).

This framework for analyzing civil claims of coercive interrogation works: it recognizes that such claims do not lie under the self-incrimination clause of the Fifth Amendment—which protects a "fundamental trial right." *Withrow v. Williams*, 507 U.S. 680, 691 (1993). (Citation

omitted.)

It also recognizes that police are not civilly liable where non-shocking promises of leniency or other improper coercion results in an involuntary statement, though procedural due process would require exclusion of the statement from trial. "[A]ny criminal *trial use*" of an involuntary confession "is a denial of due process." *Mincey v. Arizona*, 437 U.S. 385, 398 (1978). (Emphasis deleted and added.)

And, this approach allows for civil redress where the facts indicate that interrogators employed such outrageous coercion as to shock the conscience. *Wilkins v. May, supra. Bivens* claims would thus be analyzed under the Fifth Amendment due process clause, and § 1983 claims under the Fourteenth Amendment due process clause (though the standard would be the same).

Because the Court of Appeals did not follow this analytical framework, and because this framework is the only one that is fully consistent with this Court's teachings as to the nature of these various constitutional protections, the decision below should be reversed.

II. The Court of Appeals inappropriately relied on evidentiary principles to define the standard for civil liability.

As it did in *California Attorneys for Criminal Justice v. Butts, supra,* and *Cooper v. Dupnik, supra*, the Court of Appeals again resorted to *admissibility* decisions to support its conclusion that Sgt. Chavez violated Martinez's constitutional rights in the hospital. This is unsound analysis, for just because some provision of the Constitution may dictate that certain evidence be excluded from a criminal trial does *not* necessarily mean that police violated the Constitution in the method of procuring the evidence.

For example, a non-testifying coconspirator's confession implicating a non-confessing codefendant is

generally inadmissible at their joint trial, because of the Sixth Amendment right to confront adverse witnesses. *Bruton v. United States*, 391 U.S. 123 (1968). But that does not imply that the interrogating officer violated the Sixth Amendment by taking the inadmissible statement.

Likewise, a suggestive pretrial identification might be inadmissible at trial because of the Fifth or Fourteenth Amendment Due Process Clauses. *Stovall v. Denno*, 388 U.S. 293 (1967). But that admissibility rule does not mean that the officer violated the Constitution in obtaining the inadmissible identification evidence. *See, e.g., Hutsell v. Sayre, supra*, 5 F.3d at 1005 (no police liability for conducting identification procedure that resulted in inadmissible pretrial identification evidence).

The Court of Appeals had before it a claim that a police officer's conduct *itself* violated the Constitution—not that any resulting evidence might have been constitutionally inadmissible at any eventual criminal trial. But instead of analyzing the issue of whether the officer's conduct *itself* violated the Constitution by reference to decisions of this Court which define the test for such analysis, the Court of Appeals relied on decisions concerning the *admissibility* of involuntary statements. The Court of Appeals incorrectly read those decisions as having found the *questioning* unconstitutional, when in fact, this Court clearly said in each of the cited cases that it was the *evidentiary use* of the resulting confessions *in a criminal trial* that offended constitutional protections.

For example, in *Brown v. Mississippi*, 297 U.S. 278, 286 (1936), the Court said that "the *use* of the confessions thus obtained as the basis for conviction and sentence was a clear denial of due process." *Ashcroft v. Tennessee*, 322 U.S. 143, 155 (1944) spoke of the constitutional bar "against the *conviction* of any individual *in an American court* by means of a coerced confession." *Haynes v. Washington,* 373 U.S. 503, 515 (1963), held that due process had been violated "by

admission in evidence of a coerced confession...." In *Lynumn v. Illinois*, 372 U.S. 528, 529 (1963), the Court's holding could not have been clearer: "[W]e hold that the petitioner's *trial* did not meet the demands of due process of law." And *Mincey v. Arizona*, *supra*, 437 U.S. at 398, noted that "any criminal *trial use* against a defendant of his involuntary confession is a denial of due process of law." (All emphases added; emphasis deleted in *Mincey*.)

Not one of the cases cited by the Court of Appeals declared that a *police officer* had violated the Constitution in coercing the various involuntary confessions. It was enough to offend procedural due process that the statements were coerced, and so inadmissible. The **separate** issue of whether the interrogation techniques that produced these involuntary confessions were not just coercive but shocking to the conscience, so as to work an accomplished violation of substantive due process by the police officers, was not addressed.

The test for *inadmissibility* under *procedural* due process is not identical with the test of *impermissibility* under *substantive* due process. If it were, then every threat or promise that was sufficiently coercive as to render a statement inadmissibly involuntary would imply a constitutional violation by the interrogator, without regard to the conscience-shocking standard set by this Court, and applied in *Wilkins*, which the Court approvingly cited. In *Arizona v. Fulminante*, *supra*, 499 U.S. at 287, for example, the Court found a credible threat by a fellow inmate (who was a police agent) sufficiently coercive as to render a resulting statement involuntary. But this would be no warrant for finding any police officer liable for a conscience-shocking tactic that violated Fulminante's constitutional rights.

In analyzing Martinez's claim of a constitutional violation by Sgt. Chavez, the Court of Appeals completely ignored the critical distinction between what it takes to make

a confession inadmissible, and what it takes to make an interrogating officer civilly liable for substantively violating the Constitution with behavior so outrageous as to shock the conscience. This analytical error brought the Court of Appeals to a conclusion that cannot be sustained on the facts recited.

This Court should clarify that its statement in *Verdugo-Urquidez*, whether dicta or not, correctly describes the nature of the Fifth Amendment privilege against compelled *testimonial* self-incrimination at trial, and that police officers do not violate this clause of the Fifth Amendment during interrogation.

The Court should instruct the inferior courts that coercive interrogation civil claims should be analyzed as *Wilkins* described, under the *Due Process Clause* of the Fifth Amendment (*Bivens* claims against federal officers) or Fourteenth Amendment (§ 1983 claims against state officers).

Further, the Court should affirm that the proper standard for evaluating such claims is not found in admissibility decisions considering issues of voluntariness or *Miranda* compliance, but in the substantive due process cases, such as *County of Sacramento v. Lewis, supra*, and that the high threshold a plaintiff must meet is a showing of official conduct that shocks the conscience.

III. Measured against the proper standard, Sgt. Chavez's conduct was not unconstitutional.

The facts showed that Chavez attempted to obtain Martinez's version of a shooting that both men felt had inflicted fatal wounds. Chavez sought to question Martinez for a few minutes, in the hospital emergency room (not a police-dominated atmosphere rife with compulsion, but a place of rescue and lifesaving care). Martinez objected, telling Chavez, "I'm dying." When the medical personnel became insistent that Chavez desist and leave, he did so.

These brief efforts to obtain the victim's account of having been shot by a police officer before he succumbed to his wounds were hardly shocking to the conscience. Martinez was not in police custody, he had not requested the assistance of counsel, the questions were not "interrogation" (since neither man anticipated any potential incriminatory use in *this* world of any statements that might have been elicited), questioning was one-on-one, and each time Chavez was asked to stop, he did so. There were no threats or overbearing promises of leniency, and no force was used or care withheld.

In evaluating civil claims of excessive force in cases of fatal police shootings, the Ninth Circuit Court of Appeals has frequently lamented the fact that the decedent's story often goes untold, and there is only the police officer's word as to what happened. "Deadly force cases pose a particularly difficult problem under this regime because the officer-defendant is often the only surviving eyewitness." *Scott v. Henrich*, 39 F.3d 912, 915 (9th Cir. 1994). *Accord, Reynolds v. County of San Diego*, 84 F.3d 1162, 1169 (9th Cir. 1996), and *Billington v. Smith*, 292 F.3d 1177, 1181 (9th Cir. 2002).

When Sgt. Chavez tried to obtain Martinez's anticipated dying declaration about how the shooting had occurred, he was engaged in an effort that could have helped his department assess the reasonableness of the force used, and could incidentally have addressed the Ninth Circuit's expressed concerns about the lack of the decedent's description of the shooting. The questioning thus served legitimate government interests, and was not intended to injure Martinez in any way.

This Court has said that only "conduct intended to injure in some way unjustifiable by any government interest is the sort of official action most likely to rise to the conscience-shocking level." *County of Sacramento v. Lewis*, *supra*, 523 U.S. at 849. There is nothing in Chavez's motives or his methods that meets this "high threshold" of

conscience-shocking behavior so as to violate substantive due process. Under this standard of analysis, Chavez was entitled to qualified immunity. His motion for summary judgment as to the claim of unconstitutionally-coercive interrogation should have been granted.

CONCLUSION

Before the burgeoning prospect of civil liability for investigative questioning threatens to force law enforcement officers within the states and territories of the Ninth Circuit into becoming defensively reluctant to engage in any and all legitimate questioning of persons in the performance of their duties, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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